



Developments in Constitutional Law: The Second Amendment

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The Second Amendment to the U.S. Constitution provides that: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In a pair of recent landmark opinions, the U.S. Supreme Court interpreted the meaning of and protections afforded by this amendment. During its 2021 term, the Court is considering another case that may further shape how courts analyze Second Amendment claims.

DISTRICT OF COLUMBIA V. HELLER

In *District of Columbia v. Heller*, the U.S. Supreme Court held that the District of Columbia’s ban on handgun possession in the home and its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense violated the Second Amendment.¹ In reaching this conclusion, the Court interpreted the Second Amendment as providing an individual right to keep and bear arms for defensive purposes, unconnected with military service.

Drawing on a variety of founding-era sources, the Court explained that at the time the Second Amendment was ratified, Americans understood the right to keep and bear arms as “enabl[ing] individuals to defend themselves.”² The Court further observed that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a preexisting right,” an understanding buttressed by the Amendment’s directive that “it shall not be infringed.”³ According to the Court, “The debate with respect to the right to keep and bear arms ... was not whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution.”⁴ The purpose of the Amendment’s “prefatory clause,” referring to a well-regulated militia, then, is to explain why the right was codified, not to limit the right to that purpose.⁵

The Court cautioned, however, that this right is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” In particular, it stated that its opinion should not “be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁶

MCDONALD V. CITY OF CHICAGO

Two years after *Heller*, the U.S. Supreme Court considered the constitutionality of ordinances enacted by the City of Chicago and the Village of Oak Park that, similar to the District of Columbia’s ordinances in *Heller*, effectively banned handgun possession by most city residents. The question in *McDonald* was whether the Second Amendment applies to states, or only to the federal government.

In an 1833 opinion, the U.S. Supreme Court held that the first eight amendments of the U.S. Supreme Court do not operate as limitations on the states, but apply only to the federal government.⁷ Beginning in the late 19th Century, however, the Court began to hold that the due process clause of the Fourteenth Amendment, which was adopted following the Civil War, incorporates particular rights contained in the first eight amendments. While the Court’s approach to this process of incorporation varied during this period, the Court in *McDonald* characterized the primary inquiry in this process as “whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and of justice,” or “deeply rooted in this Nation’s history and tradition.”⁸

The Court then observed that its opinion in *Heller* “points unmistakably to the answer” that the right to keep and bear arms is deeply rooted in this nation’s history and tradition and was considered to be fundamental by those who ratified the Constitution.⁹ This continued to be true, according to the Court, at the time the Fourteenth Amendment was adopted.¹⁰ Concluding that “it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty,”¹¹ the Court held that the individual right to keep and bear arms for defensive purposes, articulated in *Heller*, is fully binding on the states. The Court clarified that while this guarantee limits the ability of states to devise solutions to social problems that suit local needs and values, it does not eliminate it.

SECOND AMENDMENT CLAIMS AFTER *HELLER* AND *MCDONALD*

Subsequent to *Heller* and *McDonald*, state and federal courts have analyzed Second Amendment claims using a two-pronged approach. First, courts analyze whether a challenged law burdens conduct protected by the Second Amendment. If it does not, the inquiry ends. If the challenged law does burden conduct protected by the Second Amendment, courts next analyze the strength of the government’s justification for restricting or regulating the right infringed, by using a form of “means-end scrutiny.”¹² *Heller* did not specify which level of means-end scrutiny applies, but cautioned that the least restrictive basis for review, rational basis review, may be inappropriate in the context of Second Amendment challenges.¹³ Appellate courts in Wisconsin have also employed this two-part approach.¹⁴

NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. BRUEN

In *New York State Rifle & Pistol Association v. Bruen*, the U.S. Supreme Court is considering the constitutionality of a New York law that requires a person to demonstrate proper cause to receive a license to possess a handgun. Under New York law, a license to possess a handgun may only be issued to a person who satisfies eligibility criteria and has a legally recognized reason to possess a handgun. These reasons include possession on certain types of premises, such as in one’s own dwelling, or possession in connection with certain types of employment. A person who wishes to carry a handgun “without regard to employment or place of possession,” however, must demonstrate to a local licensing official that “proper cause exists.”

The petitioners argue that the state violated their Second Amendment rights when it denied their applications to carry a handgun for self-defense. A decision in this case is likely to address certain issues *Heller* left unanswered concerning the scope of the right to bear arms outside the home.

¹ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). D.C. ordinances criminalized the carrying of an unregistered firearm and prohibited the registration of a handgun. They also prohibited the carrying of a handgun without a license but allowed the chief of police to issue licenses for a one-year period. An additional ordinance required that lawfully owned firearms in a home be kept unloaded and disassembled or trigger-locked.

² *Heller* at 594.

³ *Heller* at 591.

⁴ *Heller* at 598.

⁵ *Heller* at 577.

⁶ *Heller* at 626-627.

⁷ *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. 243.

⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 764 and 767 (citations and internal emphasis omitted).

⁹ *McDonald* at 767-69.

¹⁰ The Court identified as “The most explicit evidence of Congress’ aim [in its efforts to safeguard the right to keep and bear arms following the Civil War] ... Section 14 of the Freedmen’s Bureau Act of 1866, which provided that ‘the right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens ... without respect to race or color, or previous condition of slavery.’” *McDonald* at 773 (citations and emphasis omitted).

¹¹ *McDonald* at 778.

¹² “Means-end scrutiny” refers to any of the three levels of scrutiny that courts generally apply: (a) rational basis, which requires a law be rationally related to a legitimate governmental purpose; (b) intermediate scrutiny, which requires that the regulation be substantially related to an important governmental interest; or (c) strict scrutiny, which requires the state demonstrate that the regulation is narrowly tailored to achieve a compelling state interest.

¹³ *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *Heller*, 554 U.S. at 629, n.27.

¹⁴ See, *State v. Herrmann*, 2015 WI App 97; *State v. Christen*, 2021 WI 39; and *State v. Roundtree*, 2020 WI 11.